SARAWAK OIL PALM SDN. BHD. EMPLOYEES UNION

v.

MINISTER OF LABOUR & MANPOWER & ANOR.

HIGH COURT BORNEO, KUCHING
GEORGE SEAH J
[ORIGINATING SUMMONS NO. MR. 3 OF 1982]
24 SEPTEMBER 1982

ADMINISTRATIVE LAW: *Application for order of certiorari - Decision of Minister on question of recognition of union - Whether it should be quashed.*

The applicant ("the union") and the 2nd respondent ("the company") entered into a recognition agreement which provided, *inter alia*, that any claim of recognition must relate only to employees who were Malaysian citizens. The union, applying for recognition, requested a membership verification by a Labour Officer of the Labour Department, Miri, Sarawak. The Labour Officer made such a verification based on the total number of the employees, including immigrant workers. The union sent a memorandum to the Director-General of Industrial Relations, Kuala Lumpur and another to the Minister of Labour complaining that the membership verification did not follow the recognition agreement. An attempt by the Director-General of Industrial Relations Department, Kuala Lumpur, to resolve the matter failed. Whereupon the Director-General reported to the Minister who then decided under s. 9(5), Industrial Relations Act, 1967 (as amended) ("the Act") that the union not be accorded recognition. The union applied for an order to remove the decision of the Minister to the High Court for the purpose of its being quashed.

Held:

[1] The Court had jurisdiction in the matter. Section 9(6) of the Act does not oust the jurisdiction of the High Court to quash the decision of the Minister made under subsection 5 by means of *certiorari* proceedings if the purported decision is a nullity. [*South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors.* [1980] 2 MLJ 165; *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147; *National Union of Commercial Workers v. Lindeteves-Jacoberg (M) Sdn. Bhd.* [1981] 1 MLJ 242 and *V. Subramanian & Ors. v. Craigielea Estate* [1982] 1 MLJ 317].

[2] The decision of the Labour Officer was a nullity. The Labour Officer had failed to deal with the question remitted to him and had decided some question not remitted to him. He had based his decision on some matter which, under the terms of reference setting him up, he had no right to take into account.

[3] The Director-General of Industrial Relations had no jurisdiction to direct that meetings be convened between the union and the company with a view to resolving the issue of recognition. Neither subsection (1A),(4) nor (4A) of s. 9 of the Act applied to the memorandum sent to the Director-General.

[4] The Director-General had no power to report to the Minister about the matter under s. 9(4C). The dispute was not between the union and the company but between the union and the Labour Officer.

[5] As the report by the Director-General was not properly before the Minister, the Minister had no power to decide on the question and his decision was therefore a nullity. [*Essex Incorporated Congregational Church Union v. Essex County Council* [1963] AC 808 @ p. 834].

[Application allowed and decision of Minister quashed.]

Cases referred to:

South East Asia Fire Bricks Sdn. Bhd. v. Non-metallic Mineral Products Manufacturers Employees Union & Ors. [1980] 2 MLJ 165

Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147

National Union of Commercial Workers v. Lindeteves - Jacoberg (M) Sdn. Bhd. [1981] 1 MLJ 242

V. Subramanian & Ors. v. Craigielea Estate [1982] 1 MLJ 317

Essex Incorporated Congregational Church Union v. Essex County Council [1963] AC 808 at p. 834

Legislation referred to:

Foreign Compensation Act 1950 (UK), s. 4(4)

Industrial Relations Act 1967 (Revised 1976), ss. 9, 9(1A), 9(3) - (6), (3)(b), (c), (4A), (4C), 29(3)(a), s. 32(3)(a)

For the applicant - M.S. Sandhu; M/s. M.S. Sandhu & Co.

For the 1st respondent - E. Chapman, DPP, Standing in for Satwant Kaur, FC

For the 2nd respondent: Goh Choo Kee, Standing in for Hutang Tugal of M/s. Wan Ullok, Jugah, Chin & Co.

JUDGMENT

George Seah J:

By this notice of Originating Motion the applicant, Sarawak Oil Palm Sdn. Bhd. Employees Union (hereinafter called the Union) prays for an order to remove to the High Court for the purpose of its being quashed the decision of the Minister of Labour & Manpower made on 5 October 1981 that the Union be not accorded recognition by the 2nd respondent, Sarawak Oil Palm Sdn. Bhd., (hereinafter referred to as the Company).

Mr. Sandhu appeared for the Union, Miss Satwant Kaur appeared for the 1st respondent, YB The Minister of Labour & Manpower and YB Encik Hutang Tugal represented the Company.

Before dealing with the legal submissions I would like to set out compendiously the facts relevant to this application.

(a) On 29 September 1977 the Union applied to the Company for recognition and after conducting two checks, the Director of Labour, Sarawak, wrote to the Union on 27 October 1978 stating that the Union only represented 48.8% of the employees of the Company and suggested that the Union should make another application at a later date (see A1).

(b) On 12 August 1979 the Union and the Company entered into a Recognition Agreement whereby both parties agreed that the matter of recognition of the Union by the Company should be settled amicably upon the terms and conditions therein contained. Clause 8 reads:

> It is agreed by both the Union and the Company that this claim of recognition shall relate only to employees who are Malaysian citizens and neither party shall require attempt encourage or influence the employees who are not Malaysian citizens to become members of the Union for the purpose herein contained or for any reason or matter whatsoever. (See A2).

It seems that this clause was incorporated into the Agreement in view of a circular issued by the Indonesian Consul dated 3 February 1979 advising Indonesian immigrant workers not to join any trade union (see A3).

(c) On 19 February 1980 the Union wrote to the Officer-in-charge of Labour Department, Miri, Sarawak inviting

> you to conduct a membership verification in accordance with the provisions of the said Agreement to determine the matter of recognition.

The letter ended by saying

> Please take note that under the said Agreement it is mutually agreed that the membership verification shall not extend to non-citizens or immigrant workers who are employees of the said Company.

(See A4). A copy of this letter was extended to the Company.

(d) On 1 March 1980 the Union despatched another letter to the Labour Department, Miri, Sarawak, forwarding copy of the Recognition Agreement and a list of its members (see A5). At the request of the Labour Department, the Union forwarded the following additional documents, *viz*:

(1) the constitution of the Union,

(2) membership/subscription register,

(3) receipt books for subscriptions and entrance fees collected,

(4) application for membership and

(5) minute books.

(e) On 28 March 1980 the Company also wrote to the Labour Department, Miri, Sarawak, which reads:

> In connection with the claim for recognition by the Kesatuan Pekerja-Pekerja Sarawak Oil Palm Sdn. Bhd., we hereby enclose a list of our employees as at 15 March 1980. The list is categorised as follows:
>
> (A) Managerial staff,
>
> (B) Confidential staff,
>
> (C) Security guards,
>
> (D) Executive capacity - special and super scale Supervisor and Clerical staff,
>
> (E) Indonesian workers,
>
> (F) Local workers.
>
> (2) Categories (A) to (D) are not eligible for membership of the Union.
>
> (3) Category (E) workers are eligible for membership of the Union according to the Union Rules and Trade Union Ordinance. However, in accordance to our agreement with the Union dated 12 August 1979 those workers are to be excluded.
>
> (4) We shall be grateful if you can kindly carry out a membership check. - (See WCW2).

(f) On 18 November 1980 the Labour Department, Miri, Sarawak wrote to the Union as follows, *inter alia*:

> I have been directed to inform you that it has been ascertained that Sarawak Oil Palm Sdn. Bhd. Workers' Union membership as at 15 March 1980 represents 23.8% only of Sarawak Oil Palm Sdn. Bhd. employees.
>
> Based on the above the question of recognition of the Union rests with the employer. (See A6).

(g) On 26 November 1980 the Company officially notified the Labour Department, Miri, Sarawak, that the Company were unable to accord recognition to the Union (see WCW3).

(h) On 11 December 1980 the Union sought clarification from the Labour Department whether in making the membership verification the Labour Officer took into account the Indonesian immigrant workers or the same were excluded (see A7). On 16 December 1980 the Labour Department replied that

> The membership verification was done on the total number of workers employed by the Sarawak Oil Palm Sdn. Bhd. against the total number of members for your Union who are in benefit. Please bear in mind that the total number of workers employed by Sarawak Oil Palm Sdn. Bhd. includes local and immigrant workers who are eligible to be members of your Union. (See A8).

(i) On 5 January 1981 the Union protested to the Labour Department, Miri, Sarawak explaining the Recognition Agreement reached by the parties on membership verification and requesting for another membership verification exercise based on Clause 8 of the said Agreement (see A9). This request was not acceded to by the Labour Department.

(j) On 20 July 1981 the Union complained to the Minister of Labour & Manpower that the membership verification conducted by the Labour Department, Miri, Sarawak did not follow Clause 8 of the Recognition Agreement and requested the said Minister to resolve the matter and to give his decision regarding the claim of the Union for the recognition by the Company (see A10).

(k) Several meetings were convened by the Labour Department, Miri, Sarawak, which were attended by representatives from the Union and the Company as well as officials of the Industrial Relations Department, Kuala Lumpur, to try to resolve the matter but no solution could be reached.

(l) On 5 October 1981 the Director-General of Industrial Relations Department, Kuala Lumpur, submitted a report to the then Minister of Labour & Manpower of the failure to resolve the matter.

(m) After considering the report of the Director General and all the relevant facts placed before him, the then Minister of Labour & Manpower on 5 October 1981 decided under s. 9(5) of the Industrial Relations Act 1967 (as amended) that the Union be not accorded recognition by the Company, Sarawak Oil Palm Sdn. Bhd., Miri, Sarawak. The Union was officially notified of this decision by letter dated 10 October 1981 (see A12 and A13).

Now, s. 9 of the Industrial Relations Act 1967 (Revised 1976) had been amended by the Industrial Relations (Amendment) Act 1980 and as from 15 September 1980 (PU (B) 452/80) the amended s. 9 reads as follows:

> 9. (1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities, that is to say -
>
> (a) managerial capacity;
>
> (b) executive capacity;
>
> (c) confidential capacity; or
>
> (d) security capacity,
>
> may seek recognition or serve an invitation under s. 13 in respect of workmen employed in any of the abovementioned capacities.

(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director-General by a trade union of workmen or by an employer or by a trade union of employers.

(2) A trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim -

(a) accord recognition; or

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds for not according recognition; or

(c) apply to the Director-General to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union of workmen concerned and give a written notice of such application to such trade union of workmen.

(4) Where the trade union of workmen concerned receives a notification under subsection 3(b), or where the employer or trade union of employers concerned fails to comply with subsection 3, the trade union of workmen may report the matter in writing to the Director-General.

(4A) The Director-General, upon receipt of a reference under subsection 1A, or an application under subsection 3(c), or a report under subsection 4 may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

(4B) For the purpose of carrying out his functions under subsection 4A the Director-General -

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant; and

(b) may refer to the Registrar of Trade Unions for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Registrar of Trade Unions under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions.

(4C) Where the matter is not resolved under subsection 4A the Director-General shall notify the Minister.

(5) Upon receipt of a notification under subsection 4C the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded, such recognition shall be deemed to be accorded by the employer or trade union of employers concerned, as the case may be, as from such date as the Minister may specify; a decision of the Minister under this subsection may include a decision as to who are workmen employed in a managerial, executive, confidential or security capacity.

(6) A decision of the Minister under subsection 5 shall be final and shall not be questioned in any Court.

In *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturers Employees Union & Ors.* [1980] 2 MLJ 165 the Privy Council said at p. 168:

> ... and in the opinion of their Lordships there is no doubt that the dispute between the appellants and the respondents was a trade dispute within the definition in the Industrial Relations Act 1967 s. 2. It was therefore a dispute which the Minister had power to remit to the Industrial Court (under s. 23(2)). The Industrial Court applied its mind to the proper question for the purpose of making their award. The award was accordingly within the jurisdiction of that Court, and neither party has contended to the contrary. For the present purpose their Lordships will assume, without deciding that the award contained one or two errors of law upon its face. If so, the error or errors did not affect the jurisdiction of the Industrial Court and their Lordships are therefore of opinion that s. 29(3)(a) effectively ousted the jurisdiction of the High Court to quash the decision by *certiorari* proceedings ...

Section 29(3) (a) (now s. 32(3)(a)) in Industrial Relations Act 1967 (Revised 1976) reads:

> Subject to this Act, an award of the (Industrial) Court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called in question in any Court.

On the other hand, s. 9(6) is differently worded than s. 32(3)(a) and subsection 6 of s. 9 reads:

> A decision of the Minister under subsection 5 shall be final and shall not be questioned in any Court.

In *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147 the House of Lords had to decide s. 4(4) of the Foreign Compensation Act 1950 which provides that

> The determination by the commission of any application made to them under this Act shall not be called in question in any Court of law.

Held (Lord Morris of Borth-y-Gest dissenting) that the word "determination" in s. 4(4) of the Act of 1950 should not be construed as including everything which purported to be a determination but was not in fact a determination because the commission had misconstrued the provision of the Order defining their jurisdiction. Accordingly, the Court was not precluded from inquiring whether or not the Order of the commission was a nullity. Applying this to s. 9(6) of the Industrial Relations Act 1967 (as amended) I hold and rule that the jurisdiction of the High Court to quash the decision of the Minister by means of *certiorari* proceedings if the purported decision was a nullity is not ousted by the said subsection. Then at p. 171 Lord Reid said:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use this term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly...

This passage was cited with approval by Suffian LP in the case of *National Union of Commercial Workers v. Lindeteves-Jacoberg (M) Sdn. Bhd.* [1981] 1 MLJ 242 and *V. Subramanian & Ors. v. Craigielea Estate* [1982] 1 MLJ 317.

Both the Union and the Company had requested the Labour Officer attached to the Labour Department, Miri, Sarawak, to carry out a membership check on workmen who were employed by the Company other than those employed in the managerial, executive, confidential and security capacities. Under Clause 8 of the Recognition Agreement duly signed by the Union and the Company, it was expressly provided that in carrying out the membership verification the Labour Officer was to exclude workmen of non-Malaysian origin. Despite this, the Labour Officer seemed to disregard this agreement and carried out the membership verification based on the total number of workers employed by the Company against the total number of members of the Union who were in benefit on 15 March 1980. On this date the Labour Officer found that the Union represented 23.8% only of the total workmen of the Company. A request by the Union to the Labour Officer to carry out another check according to the agreement reached by the parties concerned was ignored. The Labour Officer concerned seems to forget that as a public servant he has a duty not only to act impartially but must be seen to have done so. Like the examples given by Lord Reid in *Anisminic's case,* the Labour Officer here had failed to deal with the question remitted to him and decided some question which was not remitted to him. He also refused to take into account something which he was required to take into account. And lastly, he based his decision or finding on some matter which, under the terms of reference setting him up, he had no right to take into account. Applying this to the facts of this case I am constrained to hold and rule that this purported decision or finding of the said Labour Officer, which was conveyed to the Union by a letter dated 18 November 1980, was a nullity.

Instead of seeking its remedy in the High Court the Union sent a letter to the Director-General of Industrial Relations in Kuala Lumpur on 14 March 1981 (see WCW4). On 20 July 1981 the Union despatched another memorandum to the Honourable the Minister of Labour & Manpower in Kuala Lumpur (see A10).

The Director-General said that acting under s. 9(4A) of the Industrial Relations Act 1967 (as amended) meetings were held in Miri, Sarawak on 22 September 1981 between the Assistant Director of Labour representing the Director-General of Industrial Relations and the Union and the Company to resolve the claim for recognition of the Union by the Company. But they were unsuccessful. Subsequently, the Director-General notified the Honourable the Minister about his failure to resolve the dispute on 5 October 1981.

Now, the first question I have to consider is whether or not the memorandum of 14 March 1981 sent by the Union to the Director-General of Industrial Relations, Kuala Lumpur could be regarded as having been despatched under s. 9(1A) of the Act? In my opinion, the essence of subsection 1A refers to any dispute as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity only. It is clear that this does not apply here since there was no dispute on this issue (see WCW2). Secondly, does s. 9(4) apply to the said memorandum? In my opinion, s. 9(4) is tied up with s. 9(3) and unless the conditions in s. 9(3) are fulfilled s. 9(4) cannot be invoked. Therefore s. 9(4) did not apply to the said memorandum also. Lastly, s. 9(4A) expressly provides that the Director-General of Industrial Relations can only act if he receives notification sent to him pursuant to (i) s. 9(1A), (ii) s. 9(3) (c) or (iii) s. 9(4) of the Act. Since the Union's memorandum did not come under any of these subsections of s. 9 thereof, it follows that the Director-General had no jurisdiction to direct the Assistant Director of Labour, Sarawak, to convene meetings between the Union and the Company with a view to resolving the issue of recognition. It

seems to me that instead of directing the Labour Officer, Miri, Sarawak, to carry out the membership verification exercise in accordance with Clause 8 of the Recognition Agreement signed by the Union and the Company the Director-General of Industrial Relations, Kuala Lumpur was trying to resolve a dispute which was doomed to failure from the very beginning in view of the purported decision or finding of the said Labour Office that on 15 March 1980 the Union only represented 23.8% of the total workmen in the employment of the Company, whose finding or decision was contrary to the term of reference.

Section 9(4C) provides that "Where the matter is not resolved under subsection 4A the Director-General shall notify the Minister." Since the Director-General had no authority to resolve the dispute under subsection 4A it follows that he had no power to report to the Honourable Minister of Labour & Manpower about the matter. In fact, there was no dispute between the Union and the Company; the dispute was between the Union and the Labour Officer, Miri, Sarawak.

In *Essex Incorporated Congregational Church Union v. Essex Country Council* [1963] AC 808 at p. 834 Lord Devlin said:

> ... A statute besides laying down conditions precedent to the entry upon the inquiry, often lays down conditions which have to be satisfied before the tribunal takes some step in the course of the inquiry or makes interim or final orders. If these conditions are not satisfied, it is then sometimes said that the tribunal had no power to take the step or make the order. That is not what is meant by general jurisdiction. If the tribunal makes an order it ought not to have made, it may thereby fall into an error of law which can be corrected, but the error does not deprive it of jurisdiction. This distinction is made clear in the opinion of the Judicial Committee in the well known case of *Colonial Bank of Australasia v. Willan* [1874] LR 5 PC 417 where it is said: '... the question is, whether the inferior Court had jurisdiction to enter into the inquiry, and not whether there has been miscarriage in the course of the inquiry.' Lord Sunner spoke to the same effect in *Rex v. Nat Bell Liquors Ltd.* [1922] 2 AC 128 at p. 151. The case of *Andrews v. Elliot* [1855] 5 E & B 502 which was cited in argument is an illustration of the same point. It illustrates also the rule that if there is no general jurisdiction, no consent or acquiescence can confer it. But if there is general jurisdiction, consent or lack of objection such as is alleged here might prevent the respondents from relying upon any irregularity in the proceedings.

Applying this to the facts here as the report or notification of the Director-General was not properly before the Honourable the Minister of Labour & Manpower on 5 October 1981 it follows that the said Minister was not entitled to and/or had no power to decide on the question. The purported decision of the 1st respondent was therefore a nullity. Since the Honourable Minister of Labour & Manpower had acted without jurisdiction or in excess of jurisdiction and applying the *ratio decidendi* in *South East Asia Fire Bricks Sdn. Bhd.* case (*supra*) the ouster provision in s. 9(6) does not apply. For the above reasons I therefore make an order quashing the purported decision of the Honourable Minister of Labour & Manpower dated 5 October 1981.

Since the Union was partly to blame for this state of affairs I order that each party will pay his own costs of these proceedings.

Also found at [1983] 1 CLJ 338